

1 XAVIER BECERRA
2 Attorney General of California
3 THOMAS S. PATTERSON
Senior Assistant Attorney General
4 NOREEN P. SKELLY
Deputy Attorney General
State Bar No. 186135
5 EMMANUELLE S. SOICHER
Deputy Attorney General
State Bar No. 290754
6 455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
7 Telephone: (415) 510-3861
Fax: (415) 703-1234
8 E-mail: Emmanuelle.Soichet@doj.ca.gov
Attorneys for Defendants Governor Edmund G.
Brown Jr. and Attorney General Xavier Becerra

10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14
15 **MICHAEL ZELENY, an individual,**

CV 17-7357 RS

16 Plaintiff,

17 v.

18 **EDMUND G. BROWN, JR., an individual,**
19 **in his official capacity; XAVIER**
BECERRA, an individual, in his official
capacity; CITY OF MENLO PARK, a
municipal corporation; and DAVE
BERTINI, in his official capacity,

REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS FILED BY
DEFENDANTS EDMUND G. BROWN
JR., GOVERNOR OF CALIFORNIA,
AND XAVIER BECERRA, CALIFORNIA
ATTORNEY GENERAL

20 Defendants.

Date: April 12, 2018
Time: 1:30 p.m.
Courtroom: 3-17th floor
Judge: The Hon. Richard G. Seeborg
Trial Date: TBD
Action Filed: December 28, 2017

1 Plaintiff Michael Zeleny's single claim against Defendants Governor Edmund G. Brown Jr.
 2 and Attorney General Xavier Becerra is somewhat difficult to decipher. Read as a whole, the
 3 actual allegations of the complaint indicate that the gravamen of the claim stems from discontent
 4 over being denied a special event permit by the City of Menlo Park. As such, Defendants Brown
 5 and Becerra moved to dismiss the claim (Count Five) on the basis that they are the wrong
 6 defendants to address Zeleny's concerns—that is, Zeleny failed to show a redressable injury at the
 7 hands of Defendants, and their involvement in the matter is too attenuated to overcome their
 8 Eleventh Amendment sovereign immunity. See Memorandum of Points and Authorities in
 9 Support of Motion to Dismiss Filed by Defendants Edmund G. Brown Jr., Governor of
 10 California, and Xavier Becerra, California Attorney General ("Motion") at 5-8. Defendants
 11 maintain this position with respect to Count Five. And Zeleny having failed to counter the
 12 argument in his opposition, the Court should grant the motion to dismiss as to the Governor and
 13 the Attorney General.

14 In his opposition, Zeleny states that he does not oppose dismissing Governor Brown as a
 15 defendant. (Plaintiff Michael Zeleny's Opposition to Defendants Edmund G. Brown Jr. and
 16 Xavier Becerra's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Opposition Brief")
 17 at p. 1, n.1.) Thus, there is no question that the Court should dismiss the Governor from suit
 18 entirely at this time.

19 As to the Attorney General, Zeleny belatedly asserts in his opposition that his real intention
 20 is to challenge the constitutionality of the state's restrictions on the open carrying of firearms in
 21 public. But the legal theories upon which Zeleny proposes to proceed as to the Attorney General
 22 (or any state defendant) are not at all clear. Thus, if the Court is inclined to read the complaint as
 23 broadly as Zeleny characterizes it in his latest brief, the Court should at least dismiss Count Five
 24 under Federal Rule of Civil Procedure Rule 8 because it is ambiguous, confusing, and improperly
 25 pleaded.

26 Federal Rule of Civil Procedure 8(d)(1) requires that "each averment of a pleading shall be
 27 simple, concise, and direct." The purpose of this requirement is to "give the defendant fair notice of
 28 what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,

1 555 (2007). A complaint violates Rule 8 if a defendant would have difficulty responding to the
 2 complaint. *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1059 (9th Cir.
 3 2011). Even if the factual elements of a cause of action are present, but are scattered throughout the
 4 complaint and are not organized into a “short and plain statement of the claim,” dismissal for failure
 5 to satisfy Rule 8 is proper. *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996). Similarly,
 6 dismissal is “well within [the court’s] discretion” when the pleadings are “confusing, distracting,
 7 ambiguous, and unintelligible.” *Schmidt v. Herrmann*, 614 F.2d 1221, 1224 (9th Cir. 1980).

8 To the extent that Count Five of the complaint can be read to allege some sort of challenge
 9 to California’s open carry laws, it is impossible to decipher the grounds for this claim. The
 10 subheading for Count Five states the claim is for a “[v]iolation of the Fourteenth Amendment to
 11 the United States Constitution.” Complaint for Declaratory and Injunctive Relief (“Complaint”)
 12 at 22. But the actual allegations following the subheading confusingly blend Fourteenth
 13 Amendment equal protection principles with assertions of specific First Amendment *and* Second
 14 Amendment rights. *Id.* at ¶¶ 130-132 (discussing the law’s alleged impact on Californians’
 15 “fundamental rights,” namely the “right to publicly bear arms” and the “right to free speech”); see
 16 *id.* ¶ 133 (referring ambiguously to “Defendants’ procedures and policies,” though Defendants
 17 Brown and Becerra are not alleged to have implemented any policies or procedures). The prayer
 18 for relief does not offer any clarity and, instead, calls for a vague declaration, “binding on all
 19 Defendants, that Zeleny’s peaceful carrying of unloaded firearms in the course of his speech . . .
 20 is constitutionally protected.” *Id.* at 23; see also *id.* at ¶ 72 (general factual allegation that
 21 “Zeleny’s protests are protected activity under both the First and Second Amendment.”).¹
 22 Zeleny’s blurry references to scattered constitutional provisions and vague request for relief make
 23 it effectively impossible to respond to the complaint.

24 Because the Governor and Attorney General have no connection with Menlo Park’s
 25 decision to deny Zeleny a special event permit, there is no case or controversy between Zeleny
 26 and the state Defendants, who are also immune from suit under the Eleventh Amendment. The

27 ¹ The opposition brief similarly blurs the basis of any intended claim, repeatedly asserting
 28 the chilling effect of the law’s enforcement on Zeleny’s First Amendment activities and case law
 on standing requirements specific to the First Amendment cases. See Opposition Brief at 10-14.

1 Court therefore should grant their motion and dismiss them from this case. To the extent the
2 Court is inclined to read the complaint as an attempted challenge to any state law regulating
3 firearms, it should at least dismiss the complaint without prejudice to Zeleny attempting to re-
4 plead a cognizable claim against an appropriate state defendant.

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6 Dated: March 15, 2018

Respectfully submitted,

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XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
NOREEN P. SKELLY
Deputy Attorney General

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/s/ Emmanuelle S. Soichet

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EMMANUELLE S. SOICHERT
Deputy Attorney General
Attorneys for Defendants

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